

CTAP CASELAW UPDATES¹ – MARCH 2008

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Planning, Zoning and Subdivision Law

Prosser v. Kennedy Enterprises, Inc., et al. (Montana Supreme Court, 2008 MT 87, on appeal from the District Court of the Twenty-First Judicial District of Montana, Ravalli County, March 12, 2008)

Defendant submitted a “precise plan of design” requesting to modify an existing commercial use on commercially zoned property for use as a casino and lounge. Such site design plans were required of any development proposed in all but single-family residential zones anywhere in the city until 2003. The city’s Board of Adjustment held a hearing on the request, which two neighboring property owners (plaintiffs) attended. One of them testified, stating concerns that the use would constitute a nuisance to his property. The Board approved the plan, with a condition that the owner comply with all federal, state, and local laws.

The plaintiffs complained that the casino use immediately became a nuisance, with loud music, loud patrons, revving car engines, fights, loud garbage dumping, and drug use occurring at the property at all hours of the night. The neighbors complained to the city council, the police chief, and the Mayor, and eventually filed a variety of tort claims against the city for violation of the zoning ordinance, its failure to take legal action against the property owner, and its failure to abate a nuisance at the site. The neighbors also sued the property owner for maintaining a nuisance. The district court granted summary judgment for the city on all claims against it, and the neighbors appealed.

The Montana Supreme Court upheld judgment for the city, agreeing that the public duty doctrine protected the city from liability for issuing the permit in the first instance, or for thereafter failing to enforce conditions of approval imposed on the plan. The public duty doctrine provides that where a municipality owes a duty to the general public, that duty is not owed to any particular individual, unless (1) a particular statute was intended to protect a specific class of persons, of which plaintiff is a member, from a particular type of harm; (2) a governmental agent undertook specific action to protect the plaintiff or the plaintiff’s property; (3) the plaintiff was reasonably induced to rely on government action; or (4) a third party in custody of the government caused harm to the plaintiff. (*Nelson v. Driscoll*, 1999 MT 193.) Because the overall intent of the city’s zoning ordinance was to “regulate and promote the

¹ Disclaimer – This information is not intended to constitute legal advice and should not be relied upon or used as a substitute for consultation with your own, your agency’s, or your organization’s licensed attorney. These case summaries are provided as technical assistance to county, municipal, state, and regional planning commissions, zoning commissions, parks or recreation boards, community development groups, community action agencies, and similar agencies created for the purposes of aiding and encouraging orderly, productive, and coordinated development of the communities of the state and to assist local governments in discharging their responsibilities.

orderly and harmonious development of the city and its environs,” and the stated intent of the design plan section was to “provide for the orderly development of property to insure compatibility to the surrounding existing and planned land uses,” the Court held that the public duty owed by the city under the ordinance is a broad one, owed to the public as a whole and not to any property owner in particular:

“Other jurisdictions have refused to find that land use regulations create a “special relationship” between property landowners and the government. (See e.g. *Wolfe v. Bennett PS & E, Inc.*, 95 Wn. App. 71, 974 P.2d 355, 359 (Wash. App. Div. II 1999) (stating that “[g]overnments enact building codes, zoning ordinances, and other land use regulations to protect the health and welfare of the general public,” and citing *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447, 450 (Wash. 1988) (holding that “the duty to issue building permits and conduct inspections is to protect the health and safety of the general public.”)); *Derwort v. Polk County*, 129 N.C. App. 789, 501 S.E.2d 379, 381 (N.C. App. 1998) (holding that the “plain language of the statute and our case law thus indicate that subdivision control is a duty owed to the general public, not a specific individual.”); *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 455 (8th Cir. 1994) (noting that under Minnesota and South Dakota state law “[b]uilding codes, the issuance of building permits, and building inspections are . . . designed to protect the public and are not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with the building codes and zoning codes.” (citations omitted)).” (*Prosser, supra*, ¶ 31.)

Even though the zoning ordinance prohibited the issuance of the permit in the first instance if it would substantially depreciate property values in the vicinity of the use, unreasonably interfere with the use or enjoyment of property in the vicinity, or endanger the public peace, health, safety or general welfare, such requirements were simply an implementation of the overall purpose of the ordinance to promote the orderly development of the community as a whole.

The plaintiffs likewise could not avail themselves of the second exception to the public duty doctrine, as a failure to act cannot demonstrate a “specific action” to protect the neighbors. (See also *Prosser v. Kennedy Enters.*, 2005 Mont. Dist. LEXIS 1517 (Mont. Dist. Ct. 2005) (“It is well established that a decision as to whether or not to prosecute and what charge to bring against an individual is entirely within the discretion of the county attorney.”).)

The Court also rejected the plaintiffs’ argument that the third exception applied because city officials gave them specific assurances that the conditions would be enforced. In the absence of an express promise that the official or the government would enforce any particular law or condition...,” the neighbors could not establish that the city had induced them to start, stop, or continue taking any action.” (*Prosser, supra*, at ¶ 41.) In any event, the Court held that such a fact would relate to whether or not a special duty to the public was breached – not whether it existed in the first place. (*Id.*, at ¶ 39.) As emphasized by the Court, the negligence action was instead properly one between neighboring private property owners:

“We do not doubt or minimize the disruption to the lives of the Neighbors allegedly caused by Kennedy's operation of the casino. The videotapes contained in the record demonstrate repeated and continuous disruptions in the form of loud music, revving car engines, fights, and arguments into the wee hours of the morning. We hold only that the Neighbors must seek redress for these claimed injuries against Kennedy, whose operation of the casino has caused these alleged harms.” (*Prosser, supra*, ¶ 43.)

Note: The Court also rebuffed the dissenting opinion that the landowners had alleged a claim for inverse condemnation against the city, noting that two of the plaintiffs rented their properties, and the one that owned hers had purchased it after the approval of plaintiff's permit. The Court identified both as a bar to an inverse condemnation claim.

Budnick v. Town of Carefree, et al. (9th Circ., on appeal from the United States District Court for the District of Arizona, March 11, 2008)

Summary: 9th Circuit upholds town's denial of a special use permit for a continuing care residential community (CCRC) for seniors, with commercial uses in a residential zone, against claims of discrimination and failure to reasonably accommodate persons with a disability. Age alone is not a “disability” within the meaning of the Fair Housing Act (FHA), and “similarly situated” projects with respect to a special use permit must, at a minimum, be located in the same zone. Disparate impact on a protected group must be demonstrated by statistical evidence, and lack of similar facilities in a community is not adequate proof of a disparate impact. Finally, the fact that a project was intended to house older residents was not adequate to show that the town should have known the residents of the project would be disabled, and the applicant must show that each component of the project necessitating the special use permit is necessary to accommodate persons with a disability.

The plaintiff applied for a special use permit (SUP) to build a CCRC consisting of an essentially self-contained neighborhood of apartments, cottages, single-family homes, an array of commercial services, and ancillary healthcare services. The property was zoned for multiple-family residences and detached single-family residences, requiring a SUP to allow for commercial uses in a residential zone, for attached rather than detached dwelling units, and for exceeding height limitations applicable to the zones.

The town's planning commission denied the application in order to achieve its zoning goals and to preserve the character of the neighborhood. The plaintiff appealed to the town council, and more than 20% of the surrounding owners protested. Under Arizona's state law (identical to Montana's prior to amendment in 1999), such protests required a ¾ majority of the council to grant the appeal. For the same reasons as the planning commission, the council denied the appeal.

After the denial, the plaintiff sent a letter to the council requiring a “reasonable accommodation” in the form of an approval of the SUP, pursuant to the Fair Housing Act (FHA). The plaintiff for the first time claimed that the community was intended to serve disabled residents, which was demonstrated by the fact that ancillary healthcare services were to be provided to the residents. The town refused to reconsider the application, and the

plaintiff sued for violation of the FHA, the Americans with Disabilities Act (ADA), the Rehabilitation Act, and violation of due process and equal protection. The district court granted summary judgment to the town on all the claims, and the plaintiff appealed on its FHA claim only, alleging the town's denial of the SUP was based on disparate treatment of disabled persons, resulted in a disparate impact on disabled persons, and failed to make reasonable accommodations to rules, policies, or practices as required by the FHA.

The appellate court upheld the judgment for the town. The court analyzed the four elements required to demonstrate a *prima facie* case of disparate treatment in denial of a SUP. Although the plaintiff (1) applied for a SUP and was qualified to receive it; and (2) the permit was denied despite plaintiff's qualification; plaintiff could not show that (3) the residents were a member of a protected class; or (4) that the town had approved similar requests from similarly situated applicants in the same time period. The plaintiff had repeatedly insisted to the town that the community's residents would be independent, active senior citizens, and only raised the claim of disability after the town had denied its application. The court emphasized that age is not the equivalent to a disability under the FHA. Plaintiff likewise could not demonstrate any other similarly situated properties, as his examples of permits issued were on properties zoned differently from the subject property.

The plaintiff likewise could not demonstrate a disparate impact on disabled persons. The court analyzed the two elements required to demonstrate a *prima facie* case of disparate impact under the FHA. Both elements require the plaintiff to provide statistical evidence demonstrating that the defendant's practices have a disparate impact on the disabled as opposed to any other group of people, which the plaintiff here could not show. The fact that no similar facilities as proposed by the plaintiff exists in a community is not adequate proof of a disparate impact.

Finally, in order to show a failure of a defendant to reasonably accommodate a person with a disability, a plaintiff must demonstrate that he or she (1) suffers from a disability; (2) defendants knew or reasonably should have known of the disability; (3) accommodation may be necessary to allow plaintiff to use and enjoy the dwelling; and (4) defendants refused to make sure accommodation. Because the evidence demonstrated plaintiff's repeated statements to the town that the community's residents would be independent, active senior citizens, plaintiff could not demonstrate the town knew of the disability. Further, plaintiff provided no evidence that allowing the project's commercial services as proposed – the primary reason for the denial of the SUP – were necessary to allow the senior residences (if disabled) to use and enjoy the dwellings in the community.

Water Law

In Re Matter of Activities of DNRC (Montana Supreme Court, Order No. 86-397, March 21, 2008)

The Montana Supreme Court issued new rules for the Montana Water Court regarding non-lawyer assistance during the DNRC's administrative review process and initial settlement

proceedings before the Water Court. These new rules primarily address corporate officers, family members, and others who have been representing a family business, trusts, or other interests. The Water Court has traditionally not required such entities to hire a lawyer to represent the organization, but some were concerned that such representation constituted the unauthorized practice of law.

The amended rules provide that non-lawyers may meet with DNRC personnel during the claim examination process and assist parties during initial settlement proceedings (after issuance of the preliminary decree but before issuance of the hearing track order). Once the water adjudication process begins, however, only lawyers or the party themselves may represent the interest of a party.

Environmental Law

Friends of Yosemite Valley v. Kempthorne, et al. (9th Circ., on appeal from the United States District Court for the Eastern District of California, March 27, 2008)

Summary: Comprehensive Management Plan prepared by the National Park Service for the Merced River in Yosemite National Park violates the Wild and Scenic River Act and the National Environmental Policy Act. The Plan failed to account for an actual level of visitor use that would not adversely impact the river, improperly provided for a protection framework that required a response only after degradation had occurred, failed to provide the Plan as a single, comprehensive document, and failed to identify a reasonable range of alternatives for environmental analysis.

Plaintiff environmental group sued the National Park Service for its latest in a series of attempts to prepare a legally adequate Comprehensive Management Plan (Plan), required under the Wild and Scenic Rivers Act (WSRA). The previous versions of the Plan had been challenged and invalidated by the 9th Circuit courts. The WSRA, administered by the federal Departments of the Interior and Agriculture, designates rivers based on their Outstanding Remarkable Values (ORVs), which provide the baseline for evaluating proposed projects' effects on the river. Once a river is designated, the agency is required to establish boundaries for the designation and classify it as wild, scenic, or recreational within one year; and prepare a Plan to provide protection for the rivers ORVs within three years. The Plan must address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the WSRA's purposes. The Interior and Agriculture Department have adopted joint guidelines interpreting the WSRA, which reinforce a "nondegradation and enhancement policy" for the designated rivers, and requires the agencies to manage the rivers so as to protect and enhance its ORVs "while providing for public recreation and resources uses which do not adversely impact or degrade those values."

The sections of the Merced River flowing through Yosemite National Park were designated as Wild and Scenic River in 1987. The National Park Service did not prepare a Plan for the Merced until the year 2000, and by 2004, the Plan was still considered legally deficient by the 9th Circuit. In summary, the former Plan had failed to adequately address user capacities, had improperly drawn the River's protection boundaries, and lacked adequate environmental

review. Despite the fact that the Court had struck down the Plan in its entirety, the National Park Service proceeded to draft a “Revised Plan” and Supplemental Environmental Impact Statement (Supplemental EIS) for the River, relying in major part on the previous documents. Because the Revised Plan still failed to account for an actual level of visitor use that would not adversely impact the river, improperly provided for a reactionary protection framework that required a response only after degradation had occurred, failed to provide the Plan as a single, comprehensive document as directed by the previous Court order, and failed to identify a reasonable range of alternatives for environmental analysis, the requirements of the WSRA and NEPA were still not met.

Constitutional Law

Card v. City of Everett (9th Circ., on appeal from the United States District Court for the Western District of Washington, March 26, 2008)

Summary: Display of a Ten Commandments monument on city property, where the city has no secular purpose in accepting and displaying the monument, and displays it in context with other non-secular monuments in a setting that does not lend itself to religious activity, does not violate the Establishment Clause.

Plaintiff citizen filed a complaint against the City of Everett, Washington, claiming the City’s display of a six-foot tall granite monument inscribed with the Ten Commandments on the grounds of the City’s old city hall (now the police department), violated the Establishment Clause of the U.S. and State of Washington Constitutions. The District Court granted summary judgment for the City, and the plaintiff appealed.

The 9th Circuit Court of Appeals upheld judgment for the City, finding that the U.S. Supreme Court’s recent decision in *Van Orden v. Perry*, 545 U.S. 677 (2005), controlled. The 9th Circuit pointed out that the 3-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) remains the general rule for evaluating whether an Establishment Clause violation exists, but exceptions to that rule have been created in the context of legislative prayer, religious activities in school, and the issuance of governmental aid.

In *Van Orden*, the U.S. Supreme Court upheld a monument nearly identical to the one at issue in *Card* (these monuments were apparently manufactured and distributed across the nation in the 1950s by the Eagles, a non-secular fraternal organization) located on the grounds of the Texas state capitol. The 9th Circuit noted that a new 2-part test set forth in *Van Orden* essentially creates another exception to the *Lemon* test for “longstanding plainly religious displays that convey a historical or secular message in a non-religious context.” Under *Van Orden*, 1) the purpose of displaying the monument must not be secular, both in actuality and in the perception of those viewing the display; and 2) the setting of the monument must not readily lend itself to meditation or other religious activity. Because nothing in the record suggested any religious motive on the part of the City of Everett in displaying the monument, and the inscription on its face plainly indicated it was donated to the City by a private organization, the Court held the non-secular purpose test of *Van Orden* was met. Likewise, because the City

displayed other non-secular monuments in the vicinity of the Ten Commandments monument, and the location of the monument in an area shrouded by shrubbery, with no lights or benches near it, combined to create a setting that does not lend itself to meditation or any other religious activity. In fact, there had been no religious activities documented at the site.

In conclusion, the Court noted that requiring the removal of such secular displays in a non-religious context would amount to the type of hostility towards religion that the Establishment Clause was intended to prevent.

Miscellaneous

Manufactured Home Communities, Inc. v. County of San Diego (9th Circ., on appeal from the United States District Court for the Southern District of California, March 6, 2008)

Summary: 9th Circuit reversed the dismissal of a defamatory lawsuit against a county commissioner for her hostile statements regarding the practices of the owner of several mobile home parks in the county, where a reasonable juror could interpret the statements to imply a false fact.

A national owner of several mobile home parks located in San Diego County initiated phase rent increases at three parks in the County. Some renters in the parks contacted a County commissioner, who thereafter made hostile public statements against the company, including a news release that the company was “preying upon elderly tenants with fixed incomes,” statements that the company was a “greedy profit-driven company that enjoys forcing the elderly out of their homes,” the company had lied to a state agency about a sewage spill clean-up effort, and that the Commissioner had contacted the County Attorney, who was reportedly “very interested” in following up on whether civil or criminal actions should be pursued against the company. The Commissioner also distributed a letter and was quoted in the newspaper making similar statements.

The company brought suit against the County and the commissioner in federal court, alleging violation of their First Amendment rights and a SLAPP suit (Strategic Lawsuit Against Public Participation), which was dismissed under California’s anti-SLAPP law. (Note: Montana does not have an anti-SLAPP statute, which is intended to provide for the swift dismissal of meritless claims brought primarily to chill free expression.) The district court held that the statements giving rise to the complaint were merely statements of opinion, and therefore not actionable under state defamation law. The 9th Circuit Court of Appeals reversed, holding that a reasonable juror could have found that the statements were “reasonably susceptible of an interpretation which implies a provably false assertion of fact.” Because her statements could be interpreted by the hearer to imply that her allegations were based in fact, the commissioner could not show at the pleadings stage that she had a probability of succeeding on the merits of the defamation claim.

Note: For a similar result under Montana law, see *Lohmeier v. Montana Eighteenth Judicial Dist.*, 2007 Mont. LEXIS 197 (Mont. Mar. 21, 2007).

